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(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Basket Creek Drum Disposal Site	)	CERCLA § 106(b) Petition No. 94-11
Chem-Nuclear Systems, Inc., and Chemical Waste Management, Inc.	)	
Petitioners.	)	

[Decided April 29, 1996]

FINAL DECISION

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

CHEM-NUCLEAR SYSTEMS, INC.,
AND CHEMICAL WASTE MANAGEMENT, INC.

CERCLA § 106(b) Petition No. 94-11

FINAL DECISION

Decided April 29, 1996

Syllabus

Chem-Nuclear Systems, Inc., and its parent corporation Chemical Waste Management, Inc. (referred to collectively as "CNSI") have petitioned pursuant to CERCLA § 106(b) for reimbursement of response costs incurred pursuant to an order issued by U.S. EPA Region IV on August 11, 1991 ("order"), that required CNSI, along with three other parties, to participate in the cleanup of hazardous substances at the Basket Creek Drum Disposal site in Douglasville, Georgia. The other three parties to the order were: 1) Continental Trading Company ("Continental"), a chemicals broker organized and existing under the laws of the State of Georgia; 2) Young Refining Corporation ("Young"), a Delaware corporation that participated with Continental in a joint venture involving the industrial waste disposal business; and 3) B. B. Hulsey d/b/a/ Hulsey Grading Company ("Hulsey"), the owner of a contracting business that transported certain industrial wastes to the site. Although all the named parties were directed to participate in the response action, only CNSI complied with the order. In support of its petition, CNSI argues: 1) that it is not liable for any remediation costs because it does not fall within any class of persons liable for such costs under CERCLA § 107(a); 2) that if it is liable for remediation costs, it is only liable for a de minimis portion of the costs; 3) that the order was arbitrary and capricious or otherwise not in accordance with law; and 4) that the order was in violation of various provisions of the United States Constitution.

In 1973, CNSI reached an agreement with Continental for Continental to remove chemical waste then being stored at CNSI's South Carolina facility and dispose of it. Thereafter, Continental and Young entered into an arrangement whereby Young would transport drums of chemical waste from CNSI's South Carolina facility for storage at Young's facility in Douglasville, Georgia. Between July 1973 and February 1974 approximately 2,400 drums containing a variety of hazardous substances were shipped from CNSI to Young's facility. In 1976, two tractor trailer rigs owned by Hulsey transported a total of approximately 160 drums containing hazardous substances from Young's facility to a ravine along Basket Creek Road in Douglas County, Georgia. Several individuals at the site then dumped 80 of the drums into the ravine before being stopped by a county health department official.

In its petition for reimbursement, CNSI asserts, among other things, that it did not arrange for disposal at the site because it sent the drums to Continental who then sent them to Young with the understanding that the materials would be reprocessed or burned as fuel. CNSI further contends that the Region failed to prove that any of CNSI's wastes were actually sent to the Basket Creek site.

Held: The petition is denied because CNSI has not proven by a preponderance of the evidence that it is not liable for response costs under § 107(a). The record indicates that hazardous substances were transported from Young's facility to the Basket Creek site and that substances similar to those originating from CNSI's facility were detected at the site. A *prima facie* case of liability against a generator of hazardous substances can be established by proving that: 1) the generator's hazardous substances were at some point in

the past shipped to a facility for disposal or treatment; and 2) the generator's hazardous substances or hazardous substances *like* those of the generator are present at the site. There is abundant evidence in this record to establish that CNSI is a responsible party. This evidence is sufficient to support the inference that CNSI's materials ultimately found their way to the Basket Creek disposal site, and CNSI has failed to demonstrate that notwithstanding this evidence it is not a responsible party. The Board therefore concludes that CNSI arranged for disposal within the meaning of CERCLA § 107(a)(3) and is therefore a liable party under the Act.

CNSI has also argued that it should not be liable for the entire costs of complying with the order because the number of drums it dumped at the site represents only 2% of the total number of drums excavated from the site. It is well settled, however, that simply proving the number of drums contributed to a site is insufficient to justify apportionment. Accordingly, the Board finds that CNSI is jointly and severally liable for the entire harm caused at the Basket Creek Site.

The Board further finds that the Agency's August 11, 1991 Unilateral Administrative Order was not "arbitrary and capricious or otherwise not in accordance with the law." Finally, the Board concludes that CNSI's constitutional objections are baseless and are therefore rejected.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge McCallum:

This matter comes before the Environmental Appeals Board on review of a petition for reimbursement of costs filed by Chem-Nuclear Systems, Inc. and its parent corporation Chemical Waste Management, Inc. (hereinafter referred to collectively as "CNSI") under Section 106(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9606(b)(2). *See* Petition for Reimbursement of Costs Under 42 U.S.C. § 9606(b)(2) ("Petition"). CNSI is an industrial waste disposal corporation organized and existing under the laws of the State of Delaware. The petition arises from an Administrative Order ("order") [1] issued by U.S. EPA Region IV, pursuant

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[1] Appendix I, Exh. A to Petition.

to CERCLA § 106(a). [2] The April 11, 1991 order required four parties, including CNSI, to abate a threat of harm to the public health, welfare, and the environment caused by the release and threatened release of hazardous substances from drums deposited at the Basket Creek Drum Disposal Site ("site") in Douglasville, Georgia. The other three parties to the order were: 1) Continental Trading Company ("Continental"), a chemicals broker organized and existing under the laws of the State of Georgia; 2) Young Refining Corporation ("Young" or "Young Refining"), a Delaware corporation that participated with Continental in a joint venture involving the industrial waste disposal business; and 3) B. B. Hulsey d/b/a/ Hulsey Grading Company ("Hulsey"), the owner of a contracting business that transported certain industrial wastes to the site. Although all the named parties were directed to participate in the response action, only CNSI complied with the Order. [3] CNSI has completed the work required and has now filed a timely petition under CERCLA § 106(b)(2)(A) seeking reimbursement of response costs it claims to have incurred. [4] In support of its petition, CNSI argues: 1) that it is not liable

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CERCLA § 106(a), 42 U.S.C. § 9606(a), authorizes the President to issue orders "necessary to protect public health and welfare and the environment" when "an actual or threatened release of a hazardous substance from a facility" poses "an imminent and substantial endangerment to the public health or welfare or the environment." The President has delegated the authority to issue such orders to EPA. *See* Executive Order No. 12580 (Jan. 23, 1987), 3 C.F.R. § 193.

Both Young and Hulsey denied liability and refused to comply with the order. *See* Appendix I, Exhs. C and D to Petition. Continental also denied liability but indicated that it would nevertheless comply with the order. *See* Appendix I, Exh. E to Petition. Ultimately, however, only CNSI participated in the response action.

Section 106(b)(2)(A) provides, in part, as follows:

> Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the

President for reimbursement from the Fund for the reasonable costs of such action, plus interest.

A petitioner thus must meet certain statutory prerequisites for obtaining review on the merits of a petition for reimbursement. These are: 1) that the petitioner received an

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for any remediation costs because it does not fall within any class of persons liable for such costs under CERCLA § 107(a); [5] 2) that if it is liable for remediation costs, it is only liable for a de minimis portion of those costs; 3) that the order was arbitrary and capricious; [6] 4) that the

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administrative order issued by EPA under CERCLA § 106(a); 2) the petitioner complied with the order and completed the required action; 3) the petitioner submitted a petition for reimbursement to EPA within 60 days after completing the required action; and 4) the petitioner incurred costs. CERCLA § 106(b). There is no dispute in the present case that CNSI has satisfied these prerequisites for obtaining review of its petition.

> Section 107(a) establishes 4 broad classes of responsible parties:
>
> (1) the owner and operator of a vessel or a facility;
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of;
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and
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> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or threatened release, which causes the incurrence of response costs, of a hazardous substance * * *.

42 U.S.C. § 9607(a).

> CERCLA § 106(b)(2)(D), 42 U.S.C. § 9606(b)(2)(D), provides:
>
> A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law.

(continued...)

order was not in accordance with law because the Region failed to include as respondents all responsible parties, because there was no evidence of imminent and substantial endangerment to the public health or welfare or the environment, because the Region failed to conduct an engineering evaluation/cost analysis or its equivalent, and because the Region did not comply with public notice and comment requirements; and 5) that the order was in violation of various provisions of the United States Constitution. The Region filed a response in opposition to the petition dated December 9, 1994. *See* Memorandum in Opposition to Petition for Reimbursement of Costs Under 42 U.S.C. § 9606(b)(2) ("Region's Response"). CNSI filed a Supplement to Petition for Reimbursement of Costs Under 42 U.S.C. §9606(b)(2) ("CNSI Supplement") on October 22, 1993. [7] CNSI has also filed a reply to the Region's Response. *See* Petitioner's Reply to EPA Region IV Memorandum in Opposition to Petition for Reimbursement of Costs Under 42 U.S.C. § 9606(b)(2).

As provided in CERCLA § 106(b)(2)(C), CNSI can obtain reimbursement if it can "establish by a preponderance of the evidence that it is not liable for response costs under § 107(a) * * *." 42 U.S.C. §9606(b)(2)(C). In addition, even if CNSI is otherwise liable, it may still recover its costs to the extent that it can demonstrate that the Region's decision in selecting certain response actions was arbitrary and capricious or otherwise not in accordance with law. CERCLA § 106(b)(2)(D), 42 U.S.C. § 9606(b)(2)(D).

The Board issued a Preliminary Decision dated February 12, 1996, in which it proposed to deny the petition for reimbursement. The Region submitted comments on the Preliminary Decision on April 15,

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> Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

In its original petition dated September 14, 1992, CNSI sought reimbursement of $7,616,699.90. In the CNSI Supplement, CNSI increased this amount to $7,633,314.90.

1996. CNSI has elected not to comment on the Preliminary Decision. Having considered the Region's comments and other submissions by the parties in support of, and in opposition to, the petition for reimbursement, and making such changes as are appropriate, the Board issues this Final Decision. *See Guidance on Procedures for Submitting CERCLA Section 106(b) Reimbursement Petitions and on EPA Review of Those Decisions* at 10 (EAB, June 9, 1994).

I. *BACKGROUND*

A. *Factual History*

In July of 1973, CNSI reached an agreement with Continental for the removal and disposal of approximately 80,000 gallons of chemical wastes held at CNSI's facility in Barnwell, South Carolina. *See* Letter from Dr. Fred Liu, President, Continental Trading Company to Dr. Henry C. Schultz, Vice-President, CNSI (June 27, 1973) (Exh. 3 to Region's Response); Note-O-Gram from H. Schultz, CNSI to L. J. Andrews, CNSI (May 10, 1973) (Exh. 1 to Region's Response) (stating that CNSI has an inventory of approximately 80,000 gallons of chemicals at the Barnwell facility requiring disposal); Note-O-Gram from Henry Schultz, CNSI to Dr. Liu, Continental (May 10, 1973) (Exh. 2 to Region's Response) ("May 10 Note-O-Gram") (discussing arrangement whereby Continental would remove and dispose of wastes accumulated at the Barnwell facility and including an inventory of materials on hand). CNSI agreed to pay Continental $10 per 55-gallon drum of 2,4-dinitrophenol and $20 per drum of all other material, in exchange for the removal and disposal of the hazardous substances stored at CNSI's facility. Letter from Dr. Fred Liu, President, Continental Trading Company to Dr. Henry C. Schultz, Vice-President, CNSI (June 27, 1973) (Exh. 3 to Region's Response).

Continental and Young, which as previously stated were joint venturers in the waste disposal business, then entered into an arrangement whereby Young would transport drums of chemical waste from CNSI's South Carolina facility for storage at Young's facility in Douglasville, Georgia. The materials would then either be reprocessed or resold, used as fuel in Young's petroleum refining operation, or buried. *See* Young's Response to EPA Information Request at 19 (Exh. 5 to Region's Response); Letter from Fred Liu, President of Continental to Hartsill W. Truesdale, Environmental Engineer, South Carolina Department of Health

and Environmental Control (Nov. 2, 1993) (Exh. 4 to Region's Response). [8]

Between July 1973 and February 1974 approximately 2,400 drums containing a variety of hazardous substances were shipped from CNSI to Young's facility. [9] *See* Continental Invoices for Shipments 1-32 (Exh. 7 to Region's Response). The record indicates that Young also received a lesser amount of wastes from other sources such as Monsanto Textiles Company (approximately 78 drums) and Jennat Corporation (approximately 485 drums). Young's Response to EPA Information Request at 11-12 (Exh. 5 to Region's Response). Because a lesser quantity of the wastes received from CNSI than anticipated could be resold, reprocessed, or burned as fuel, a large number of drums began accumulating at Young's facility. This accumulation of wastes created a storage and disposal problem for Young. *See* Young's Response to EPA Information Request at 22 (Exh. 5 to Region's Response) ("[C]ertain materials received from Chem-Nuclear could not be burned because they lacked appropriate BTU value or contained too much water. These same materials were incapable of being reprocessed by Continental Trading."); Letter from Young Refining Corp. to Continental (April 22, 1974) (Exh. 8 to Region's Response) (expressing "urgent" need to sell off or dispose of accumulating materials); Petition at 10 (stating that because some of the materials were not suitable for burning, reconditioning, or resale, it was necessary to arrange for disposal). By March of 1976, between 1,200 and 1,800 drums had accumulated at Young's facility. Deposition of C. B. F. Young at 55-56 (March 3, 1993) (Exh. 12 the Region's Response).

Young initially sought to dispose of the accumulated drums through Metals Recycling, Inc. of Borden Springs, Alabama. *See* Letter from C. B. F. Young to Fred Liu (September 26, 1974) (Exh. 9 to Region's Response). Alabama State officials, however, refused to permit

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CNSI had no direct contractual relationship with Young. Young's Response to EPA Information Request at 14 (Exh. 5 to Region's Response).

The contents of 154 of the drums shipped from CNSI were unknown. *See* Letter from Continental to CNSI (March 6, 1974) (Exh. 10 to Region's response).

the disposal of the materials at the proposed site and wastes shipped to the Alabama site were later returned to Young's facility in Georgia. *See* Young's Response to EPA Information Request at 22 (Exh. 5 to Region's Response); Letter from Alfred S. Chipley to Shirley Maxwell (March 4, 1976) (Exh. 13 to Region's Response).

On March 17, 1976, two tractor trailer rigs owned by Hulsey transported approximately 160 drums (80 drums each) containing hazardous substances from Young's facility to a ravine along Basket Creek Road in Douglas County, Georgia. Petition at 7. Several individuals at the site then began dumping the drums into the ravine. At approximately 9:45 p.m. on that day, in response to a citizen's complaint, Douglas W. Daniell, a Douglas County Health Department official, arrived at the site. Affidavit of Douglas W. Daniell at ¶ 2 (Nov. 17, 1994) ("Daniell Affidavit") (Exh. 15 to Region's Response). When he arrived, Daniell observed that one of the trailers was empty and that a substantial number of drums had been dumped into the ravine and were in the process of being covered by dirt using a bulldozer. *Id*. Many of the drums had been crushed by the bulldozer and "liquid was spilling out all over as drums were bursting and breaking." *Id*. Daniell also observed that the second trailer was fully loaded but that the side planks had been removed "and persons were on the trailer preparing to push the 55-gallon drums into the ravine." *Id*.; Memorandum From Moses N. McCall, Chief, Land Protection Branch, Georgia Department of Natural Resources to John D. Taylor, Program Manager, Industrial Solid Waste & Resource Recovery Program (May 21, 1976) ("McCall Memo") (summarizing discussion with Daniell) (Exh. 16 to Region's Response).

Daniell asked several questions of the four men present but they refused to answer. *See* Daniell Affidavit at ¶3. One of the men, Bartlett Hulsey, identified himself and gave Daniell his business card. *Id*. Daniell wrote down the license plate numbers of both trailers and instructed the persons at the location to cease the dumping and to stay until he returned. He then went to a nearby telephone to call the county sheriff. *Id*. When Daniell returned to the site, everyone had gone and only the trailer loaded with drums remained. *Id*. at ¶4; McCall Memo at 1. The following morning, Daniell received a call from C. B. F. Young of Young Refining

Company. Young stated the drums observed in the ravine came from Young Refining. Daniell Affidavit at ¶ 6. Young explained that he hired Hulsey to dispose of drums stored at Young Refining, but he did not know where Hulsey intended to dispose of the drums. *Id*.; Petition at 9.

On March 18, 1976, officials from the Georgia Department of Natural Resources, Environmental Protection Division ("EPD") inspected the site and confirmed that 80 55-gallon drums containing unknown liquid waste had been dumped the night before and had been partially covered by dirt using a bulldozer. *See* Trip Report prepared by Daniel D. Hull at 2 (April 6, 1976) ("Trip Report") (Exh. 17 to Region's Response). The officials also observed that a flat-bed trailer containing another 80 drums remained at the site. [10] *Id*. State officials later referred the site to EPA. Petition at 6.

Following an analysis of the site in 1989 and 1990, Region IV determined that the site posed an imminent and substantial endangerment to public health and the environment. In particular, the results of a magnetic survey conducted by the Region's Technical Assistance Team ("TAT") in 1990, revealed the presence of "two large positive magnetic anomalies that probably represent buried drums." *See* Final Technical Assistance Team Report at 4 (May 2, 1990) (Exh. 18 to Region's Response). In addition, the sampling investigation conducted by the TAT revealed the presence of trichloroethene and mercury in nearby drinking water wells in concentrations at or just below the maximum contaminant levels allowable under applicable EPA drinking water standards. *Id*. at 5. The report also states that:

> Low levels of mercury were detected in the sediment and surface water samples collected downgradient of the drum disposal area. A number of other metals were also detected in the downgradient sediment sample as well as trace amounts of several solvents.

Prior to issuance of the administrative order, these drums were removed from the site and returned to Young Refining for proper disposal.

Id. Thereafter, on April 11, 1991, the Region issued the above-mentioned administrative order.

As required by the order, CNSI submitted a Removal Action Plan on April 19, 1991, explaining how the required actions would be completed. Petition at 18; Order at 6. The Region approved the plan on May 21, 1991, and removal activities began on September 8, 1991. Petition at 18. All actions required by the order were completed by July 17, 1992, [11] and CNSI submitted a Project Closeout Report on August 3, 1992. *Id*. at 21. EPA approved the removal action on August 21, 1992. *Id*.; Letter from R. Donald Rigger, Region IV, to Michael Ryan, CNSI, (Aug. 21, 1992) (stating that CNSI has complied with the terms of the Order) (Appendix V, Exh. BB to Petition). As stated above, on September 14, 1992, CNSI filed a timely petition under section 106(b)(2) of CERCLA, seeking reimbursement of costs incurred plus interest, attorneys' fees and other expenses.

B. *Statutory Background*

CERCLA was enacted "in response to widespread concern over the improper disposal of hazardous waste." *In re The Sherwin-Williams Company*, CERCLA § 106(b) Petition No. 94-7 slip op. at 9 (EAB, Oct. 12, 1995) (quoting *United States v. Alcan Aluminum Corp.*, ("Alcan I") 964 F.2d 252, 257 (3rd. Cir. 1992)). It is largely a remedial statute designed "to accomplish the dual purpose of ensuring the prompt cleanup of hazardous waste sites and imposing the costs of such cleanups on responsible parties." *In re Findley Adhesives, Inc.*, CERCLA § 106(b) Petition No. 94-10, slip op. at 2 (EAB, Feb. 10, 1995). Courts have traditionally construed CERCLA's liability provisions "liberally with a view toward facilitating the statute's broad remedial goals." *United States v. Shell Oil Co.*, 841 F. Supp. 962, 968 (C.D. Cal. 1993); *Sherwin-Williams*, *supra*, at 9.

In all, CNSI removed approximately 4,456 crushed drums, more than 8,000 tires, and over 12,000 yards of contaminated soil from the site. Petition, ¶1 at 13.

CERCLA provides two approaches for response actions for the cleanup of hazardous waste sites: (1) the Federal government may itself respond to a release or threatened release [12] of hazardous substances [13] at a facility, [14] then seek reimbursement from the responsible parties, pursuant to CERCLA §§ 104 and 107, 42 U.S.C. §§ 9604 and 9607; or (2) where there is an imminent and substantial threat of harm, the Federal government may issue an administrative order directing any person or persons to undertake abatement of the release pursuant to CERCLA § 106(a), 42 U.S.C. § 9606(a). This includes orders directing the potentially responsible parties to clean up the hazardous waste site. *See In re Tamposi Family Investments*, CERCLA § 106(b) Petition No. 94-6, slip op. at 3 (EAB, July 6, 1995). This latter course is the one the Region followed in the present case. Those parties who comply with the administrative order may, under section 106(b)(2)(A), 42 U.S.C. § 9606 (b)(2)(A), petition the Agency for reimbursement of reasonable costs incurred during the cleanup, as CNSI has done here.

In order for a petitioner to obtain reimbursement for its costs, CERCLA § 106(b)(2)(C) provides that the petitioner:

> [S]hall establish by a preponderance of the evidence that it is not liable for response costs under [section 107(a)] and that the costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

Section 101(22) defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching ,dumping or disposing into the environment * * *." 42 U.S.C. § 9601(22).

CERCLA defines a "hazardous substance" as any substance identified as such by the statute itself or EPA regulation. CERCLA §§ 101(14), 102; 42 U.S.C. §§ 9601(14), 9602.

Section 101(9) defines "facility" as: "(A) any * * * well, pit, pond, lagoon, impoundment, ditch, landfill, * * * or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located * * * ." 42 U.S.C. § 9601(9).

In addition, under CERCLA § 106(b)(2)(D), a petitioner who is otherwise liable for response costs can recover its reasonable costs of response to the extent that:

> [I]t can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law.

42 U.S.C. § 9606(b)(2)(D).

As the Board has previously stated, the statute makes clear that in a CERCLA § 106(b) proceeding it is the petitioner that bears the burden of proof (including the burden of initially going forward with the evidence and the ultimate burden of persuasion). *See Sherwin-Williams*, *supra*, at 11-12. Thus, CNSI can establish its right to reimbursement if it can prove by a preponderance of the evidence that it is not a liable party under CERCLA § 107(a). In addition, even if CNSI is a liable party, CNSI can obtain reimbursement of all or part of its costs to the extent it can prove that the Region's selection of the response action in the April 11, 1991 order was "arbitrary and capricious or was otherwise not in accordance with law." In this latter respect, CNSI can also obtain partial reimbursement if it can prove that the harm associated with its waste is divisible and there is a reasonable basis for apportionment. *See In re William H. Oliver*, CERCLA § 106(b) Petition No. 94-8, slip op. at 21-22 (EAB, July 5, 1995).

II. *DISCUSSION*

A. *Liability Under CERCLA § 107*

Before addressing CNSI's assertion that it is not a liable party, it would be helpful to briefly review the elements of liability under CERCLA. First, we note that liability under CERCLA is strict, without regard to a party's fault or state of mind. *See Alcan I*, 964 F.2d at 259; *United States v. Monsanto*, 858 F.2d 160, 167 (4th Cir. 1988), *cert denied*, 490 U.S. 1106 (1989); *New York v. Shore Realty Corp.*, 759 F.2d

1032, 1044 (2nd Cir. 1985). Second, for a recipient of an administrative order issued by EPA under CERCLA § 106, liability for clean-up costs attaches under CERCLA § 107 where the following elements are established: 1) the site in question is a "facility" as defined in CERCLA § 101(9); 2) a release or threatened release of a hazardous substance has occurred at the facility; and 3) the recipient of the administrative order is a responsible person under CERCLA § 107(a). *See United States v. Alcan Aluminum Corp.*, ("Alcan II"), 990 F.2d 711, 719 (2nd Cir. 1993); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 668 (5th Cir. 1989). One of the classes of responsible persons under CERCLA § 107(a) is any person who "arranged for disposal" of a hazardous substance. CERCLA § 107(a)(3). This class is commonly referred to as "generators."

In the present case, there is no dispute as to whether the Basket Creek Site is a "facility" or whether a release occurred. The only element of liability that CNSI contests is whether, as the April 11, 1991 order alleges, CNSI arranged for disposal of wastes at the site. *See* Order at 2. According to CNSI, it did not arrange for disposal at the site. CNSI states the it "sent the material to Continental, which then transported the material to its joint venturer, Young, with the understanding that the substances would be reprocessed for resale, and that materials unsuitable for reprocessing would be burned as fuel." Petition at 22. Apparently, it is CNSI's view that because it did not specifically authorize anyone to dispose of the wastes in the manner and location where the drums were ultimately deposited, it is not a liable party under the Act. [15] In addition, CNSI contends that the Region failed to prove that any of wastes originating from CNSI's facility were sent to the Basket Creek site.

We note that CNSI's argument in this regard is somewhat ambiguous. That is, it is possible to interpret the above-quoted language on page 22 of the petition as implying that CNSI did not arrange for *disposal* because it sent the hazardous substances to Continental with the understanding that the substances would be recycled in some way (*i.e.* the material would either be reprocessed, resold, or burned as fuel). Later in its petition, however, CNSI concedes that it did indeed arrange with Continental for disposal of the hazardous substances transported from CNSI's facility. Petition at 25 ("The only evidence that has ever existed reflects only that * * * CNSI had arranged for disposal of certain wastes by Continental which then arranged for disposal by the Young-Continental Joint Venture.").

Petition at 22 ("EPA made no findings that any materials for which CNSI arranged for disposal were ever deposited at the Basket Creek Drum Disposal Site."). We disagree with both of these arguments.

It is clear from the record before us that CNSI arranged with Continental for the removal and disposal of hazardous substances. In addition, it is undisputed that, under this arrangement, drums containing hazardous substances were transported from CNSI's facility in South Carolina to Young's facility in Georgia. The record also indicates that hazardous substances were transported from Young's facility to the Basket Creek site and that substances similar to those originating from CNSI's facility were detected at the site. A *prima facie* case of liability against a generator can be established by proving that: 1) the generator's hazardous substances were at some point in the past shipped to a facility for disposal or treatment; and 2) the generator's hazardous substances or hazardous substances *like* those of the generator are present at the site. [16] *Monsanto*, *supra*, 858 F.2d at 169 n.15. The government "need not establish a direct causal connection between the [generator's] hazardous substances and the release * * *." *Sherwin-Williams*, *supra*, at 25 (quoting *Alcan I*, 964 F.2d at 265). Rather, as stated above, CERCLA only requires proof that a generator arranged for disposal of hazardous substances that were "like" those contained in wastes found at the site. *Monsanto*, *supra*, 858 F.2d at 169; *Alcan II*, 990 F.2d at 721. As the Fourth Circuit stated in *Monsanto*:

> As used in the statute, the phrase "such hazardous substances" [in CERCLA § 107(a)(3)] denotes hazardous substances alike, similar, or of a like kind to those that were present in a generator defendant's waste or that could have been produced by the mixture of the

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Contrary to CNSI's argument's in this regard, because CERCLA is a strict liability statute, the government need not prove that the generator of the hazardous substances selected the ultimate disposal site in order to establish a prima facie case of liability. *United States v. Mottolo*, 695 F. Supp. 615, 626 (D. N.H. 1988); *United States v. Wade*, 577 F. Supp. 1326, 1333 n.3 (E.D. Pa. 1983); *Violet v. Picillo*, 648 F. Supp. 1283, 1291 (D. R.I. 1986); *United States v. Ward*, 618 F. Supp. 884, 895 (E.D. N.C. 1985).

> defendant's waste with other waste present at the site. It does not mean that the [government] must trace the ownership of each generic chemical compound found at a site. Absent proof that a generator['s] * * * specific waste remained at a facility at the time of release, a showing of chemical similarity between hazardous substances is sufficient.

858 F.2d at 169 (footnote omitted). *See also*, *United States v. Wade*, 577 F. Supp. 1326, 1332 (E.D. Pa. 1983) (stating that "to require a plaintiff under CERCLA to 'fingerprint' wastes is to eviscerate the statute."). This is also true where multiple generators arrange with an intermediary to dispose of hazardous substances which are stored at one site and then transported to the ultimate disposal site. *See United States v. Bliss*, 667 F. Supp. 1298, 1310 (E.D. Mo. 1987) (holding that the government need not trace the specific waste found at the disposal site back to a particular generator. "After leaving a generator's plant, the wastes may be transferred through several intermediaries * * * before the ultimate disposal of the waste. After disposal, the wastes may migrate and mingle with the wastes of others. Therefore, in the case of generators, courts have required only a weak showing of causation.").

In the present case, CNSI contracted with Continental for disposal of waste containing hazardous substances. The record indicates that hazardous substances which CNSI arranged to have removed from its facility included mercury, chloroform, cresol and xylene. *See* May 10 Note-O-Gram. These hazardous substances were among those identified in the waste at the Basket Creek site. *See* EPA Analytical Data, Tab D (Exh. 33 to Region's Response). In addition, the record indicates that CNSI arranged for disposal of generic materials such as solvents and waste oils. *See* May 10 Note-O-Gram. Data submitted by the Region indicate, and CNSI does not dispute, that numerous hazardous substances found at the site are either solvents or are common hazardous constituents found in waste oils. Region's Response at 14; EPA Analytical Data (Exh. 33 to Region's Response). Further, the day after Daniell reported that approximately 80 drums had been dumped at the site, EPD took samples from two of the drums remaining on the trailer left at the site. *See* Final

Technical Assistance Team Report ("TAT Report") at 2 (May 2, 1990) (Exh. 18 to Region's Response). The results of one sample revealed the presence of chlorophenol (TAT Report at 2), a substance listed by CNSI on a 1973 inventory of materials requiring disposal (*see* May 10 Note-O-Gram), and which was later detected in samples taken from the site. When the forgoing evidence is combined with the evidence regarding CNSI's disposal agreement with Continental, then the transfer of the wastes to Young (Continental's co-venturer), and the subsequent transfer of similar wastes from Young to Hulsey, who in turn transported wastes to Basket Creek, a *prima facie* case exists that CNSI arranged for disposal of hazardous substances "similar" to those found at the site or "that could have been produced by the mixture of defendant's waste with other waste present at the site." *Monsanto*, *supra*, 858 F.2d at 169.

In rebuttal, CNSI's petition offers only conclusory allegations stating that the Region has no evidence that any of the drums originating at CNSI's South Carolina facility were still at Young's facility in March of 1976 or, if any of CNSI's drums were present at Young's facility, that any were actually transported to the Basket Creek site. Petition at 22. CNSI's argument is insufficient to support granting its petition. There is abundant evidence in the record, as discussed above, to establish that CNSI is a responsible party. This evidence is sufficient as a matter of law to support the inference that CNSI's materials ultimately found their way to the Basket Creek disposal site. It is therefore incumbent upon CNSI to demonstrate that notwithstanding this evidence CNSI is not a responsible party. *See Monsanto*, *supra*, 858 F.2d at 170-171 (in order to rebut a *prima facie* case of liability, a defendant must produce "specific evidence creating a genuine issue" as to whether its wastes were present at the disposal site). For example, if CNSI were able to point to evidence in the record that the Agency had overlooked, such as documents clearly demonstrating that the materials were actually shipped for disposal to a site other than Basket Creek, then such evidence, if otherwise probative and credible, might be sufficient to establish that CNSI is not a responsible party. It is not enough, however, for CNSI merely to assert that the record should contain more evidence before it can be held responsible for the response costs. As the party having the burden of proof, CNSI cannot prevail by arguing, as it has done here, that the

Agency has no conclusive evidence that any drums originating from CNSI were actually shipped to Basket Creek. Thus, we conclude that CNSI arranged for disposal within the meaning of section 107(a)(3) and is therefore a liable party under CERCLA.

In the supplement to its petition, CNSI has presented additional evidence in support of its assertion that it is not liable under CERCLA. In particular, CNSI has submitted the affidavits of William Lee Hall, Plant Manager of the Young Refining Plant from 1955 to 1988, and Bobby Nunnally, an employee of Arivec Chemicals, Inc. ("Arivec") in Douglasville, Georgia. *See* Exhs. A and D to CNSI Supplement. In addition, CNSI has submitted the depositions of C.B. Young, President of Young Refining, and James Parivechio, Jr., President of Arivec. *See* Exhs. B and C to CNSI Supplement. CNSI relies on these submissions to support its argument that the Region failed to prove that any of the drums dumped at the site came from CNSI's facility. In particular, CNSI suggests that the hazardous substances came from other sources and that none of the drums transported to the Basket Creek site on March 16, 1976, were actually dumped. Because we conclude that neither the Parivechio nor the Nunnally submissions have any bearing on CNSI's liability, [17] we address only CNSI's arguments relating to the affidavit of William Lee Hall and the deposition of C. B. Young.

Hall Affidavit (July 14, 1993): Hall was the plant manager of the Young Refining facility in the 1970s and observed numerous truckloads of wastes from various sources arrive at the facility. Hall Affidavit at ¶¶ 3-4 (Exh. A to CNSI Supplement). In his affidavit, Hall stated that in mid-March of 1976, drivers from Young Refining attempted to dispose

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Both the Parivechio deposition and the Nunnally affidavit are offered to show that Arivec Chemicals, Inc. may have also contributed hazardous substances similar to those allegedly shipped from CNSI's facility to the Basket Creek site. As liability under CERCLA is joint and several, however, whether or not Arivec also contributed hazardous substances to the site is not relevant to CNSI's liability. Of course, pursuant to CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1), CNSI may seek contribution from any other person who is liable or potentially liable under § 107(a). *See Monsanto*, *supra*, 858 F.2d at 168 n.13.

of two truckloads of drums (each truck carrying 80 drums) at the Basket Creek site but were prevented from doing so by a Douglas County officer, and that the "trucks and trailers were left overnight at the Basket Creek Road property." *Id*. at ¶ 7. He further stated:

> When I saw the trucks as they returned to Young Refining the next day after the attempted disposal at Basket Creek, no more than 4 to 5 drums were missing from one trailer and the other trailer was still full.

Id. at ¶ 8. According to CNSI, this supports its assertion that few, if any, drums were actually dumped at the site and that the Region therefore erred in naming it as a responsible party.

As the Region has pointed out, however, Hall's statement in this regard, directly contradicts his earlier statement in a 1991 interview with an EPA investigator. *See* Summary of Interview conducted with William Lee Hall, prepared by Herb Miller, Civil Investigator, Waste Programs Branch (Sept. 19, 1991) (Exh. 38 to Region's Response). In that interview, not only did Hall fail to mention that he observed full or nearly full trailers return to Young Refining, he specifically stated that he did not see the trailers when they returned. *Id*. at 2. Moreover, he stated that he assumed that some of the drums had been dumped at the site because "Hulsey had lost a wallet with $2,100 in it while he was covering the drums with dirt." *Id*. We also note that Hall was not at the site when the dumping occurred, and that his statement is inconsistent with observations made by Daniell and others who visited the site and observed that drums from one of the trailers had been dumped. We therefore give little weight to the affidavit. [18]

Even were we to accept CNSI's suggestion that only 4 or 5 drums had been dumped at the site, it would not affect CNSI's liability in this case. *See infra* note 21 and section "B. *Divisibility*."

C. B. Young Deposition (March 3, 1993): [19] In his deposition, C. B. Young states that on the night of the alleged dumping, he was present at the Basket Creek site. Young Deposition at 31-32 (Exh. B to CNSI Supplement). Apparently, he drove to the site at about 9:00 p.m. (and arrived about 20 minutes later) after he received information that drums from Young Refinery were being dumped at the site. *Id*. at 31-33. C. B. Young stayed at the site for approximately 10 minutes, just long enough to determine whether the trucks belonged to Young Refining. *Id*. at 49. He then left without speaking to anyone. *Id*. ("I didn't speak to anyone. I just looked around the place, saw what it was, saw the two trucks, and then got in my car and drove away."). According to C. B. Young, there were two trucks at the site and some heavy earth-moving equipment. With regard to the contents of the trucks, the deposition states as follows:

> Q: And you say the trucks were loaded?
> A: Yes.
> Q: What was on them?
> A: Drums.
> Q: On both trucks?
> A: I remember one truck was full and the second truck was full or a few drums were off of it. *And I'm not clear in my mind what was true there*.
> Q: *So your sure one truck was full, and as to the second truck, you're not sure?*
> A: *That is true. That's correct.*

Id. at 37 (emphasis added).

CNSI cites this deposition in support of its assertion that the Region failed to establish that any of the drums from Young Refinery were actually dumped at the site on March 16, 1976. At best, however, this deposition is inconclusive. As the portion of the deposition

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CNSI states that "[t]he deposition was not completed at that time [(March 3, 1993)], and the transcript included herewith [as Exh. B] has not been signed by Young." CNSI Supplement at 3. n.1.

highlighted above indicates, C. B. Young was unsure how many drums remained on the second truck. Moreover, the deposition is inconsistent with information C. B. Young previously submitted to Region IV officials investigating the site. In particular, he stated in his deposition that "nothing" was taking place at site when he arrived. *Id*. at 38. He further stated that he didn't remember "any equipment being moved, trucks being moved or anything * * *." *Id*. at 38-39. In response to an informal EPA information request in 1991, however, C. B. Young recalled that when he arrived at the site he observed two men "engaged in burying drums." Young's Response to Informal Information Request (Feb. 12, 1991) (Exh. 36 to Region's Response). [20] Under these circumstances, the deposition fails to convince us that CNSI is not liable for any of the contamination at the site. On the contrary, based on the record before us (including the observations of Daniell and follow-up inspections by State officials), we conclude that the contents of one of the trailers transporting drums from Young's facility (80 drums) was indeed dumped at the site on March 17, 1976.

For all these reasons, we conclude that CNSI has failed to prove by a preponderance of the evidence that it is not liable for response costs under CERCLA § 107(a) as required by CERCLA § 106(b)(2)(C). [21]

We also note that it appears from the deposition that Young may have arrived and departed the site *before* the arrival of the county health official, Douglas W. Daniell. According to the deposition, Young arrived at the site at approximately 9:20 p.m. and left 10 minutes later. *Id*. at 32-33, 48. Daniell did not arrive at the site until 9:45 p.m. *See* Daniell Affidavit at 1. Thus, even if both trucks were full when Young arrived at the site, it is possible that the contents of one was dumped before Daniell arrived.

CNSI also states that drums with labels from other companies such as "M & T Chemical Company," "Allied Chemical, Morristown, N.J.," and "Free State Supply Co." were excavated from the site but that these and other companies known to have contributed drums to the site were not named as respondents in the order. Petition at 22-23. Because we conclude that CNSI is jointly and severally liability for the costs of cleaning up the site, however, whether or not other companies also contributed hazardous substances to the site is irrelevant to our determination. *See Sherwin-Williams*, *supra*, at 28 (the fact that others may have contributed to the contamination is no defense to liability). Moreover, the Region's decision not to name certain parties as respondents in

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B. *Divisibility*

In the alternative, CNSI asserts that even if 80 of the drums dumped at the Basket Creek site were attributable to it, this represents less than 2% of the total number of drums excavated from the site. [22] Petition at 23. The remaining contamination was attributable to other sources. *Id*. at 23-24. Thus, according to CNSI, "CNSI's contribution * * * to the contamination at the Site was de minimis, and CNSI should be liable only

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an administrative order is a matter of enforcement discretion which the Board declines to review. *See United States v. Marisol, Inc.*, 725 F. Supp. 833, 843 (M.D. Pa. 1989) (CERCLA defendants may not compel the government to name every other available defendant; the government has wide discretion in choosing among tortfeasors).

CNSI also argues that it should not be held liable under CERCLA because CNSI's contribution to the site was de minimis (*i.e.*, no more than 80 drums). Although, as discussed below, the amount of a party's contribution may be considered in determining whether the environmental harm is divisible and reasonably capable of apportionment, it is not a defense to CERCLA liability. *See United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 260 (3rd. Cir. 1992) (CERCLA does not impose any quantitative requirement on liability, nor does liability depend on the existence of a threshold quantity of hazardous substances); *Mid Valley Bank v. North Valley Bank*, 764 F. Supp. 1377, 1386 (E.D. Cal. 1991) (CERCLA liability may be imposed regardless of the extent of a party's contribution); *Marisol, supra*, 725 F. Supp. at 843 (there is no de minimis defense to CERCLA liability); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 215 (D. Mo. 1985) (de minimis generator may be liable under CERCLA). Accordingly, we interpret CNSI's assertions in this regard as an argument in favor of apportionment. We also note that CERCLA § 122(g)(1)(A), 42 U.S.C. § 9622(g)(1)(A), establishes a de minimis settlement procedure applicable where the amount of hazardous substances contributed by a party and the toxic or other hazardous effects of these substances are minimal in comparison to other hazardous substances at a facility. Such a provision would be unnecessary if there were a de minimis exception to liability.

We note that although the petition states that, at most, no more than 80 drums could be attributable to CNSI, CNSI's Supplement states that no more 4 or 5 drums could be attributable to CNSI. CNSI Supplement at 8. Presumably, in arriving at the 4-5 drum number CNSI relies on the affidavit of William Hall and the Deposition of C. B. Young discussed above. As stated above, however, we find neither of these submissions convincing with regard to the number of drums attributable to CNSI. On the contrary, the record supports the Region's contention that at least 80 drums dumped at the site can be attributed to CNSI.

for the payment of the clean up costs attributable to its portion of its contamination, or less than two percent (2%) of the $7,616,699.90 CNSI has spent for the ordered Removal." *Id.* at 24. CNSI argues that under the circumstances, it should not be held jointly and severally liable for the entire costs cleaning up the site.

Although liability under CERCLA is ordinarily joint and several, courts have held that such liability is not mandatory in all cases. *In re Bell Petroleum*, 3 F.3d 889, 895 (5th Cir. 1993); *Monsanto, supra*, 858 F.2d at 171; *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983). As the court stated in *Chem-Dyne*, "when two or more persons acting independently cause[] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he himself caused." [23] *Chem-Dyne*, *supra*, 572 F. Supp. at 810. The burden of establishing that apportionment is appropriate, however, is on the responsible party, and, as the Board has previously stated, this burden

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In this regard, we note that courts have looked for guidance to the Restatement (Second) of Torts in applying CERCLA's liability scheme. *See United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 268 (3rd Cir. 1992); *United States v. Picillo*, 883 F.2d 176, 178 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 810 (S.D. Ohio 1983). Section 433 of the Restatement provides that where two or more joint tortfeasors acting independently cause a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each tortfeasor is liable only for that portion of the harm that it caused. In particular, the restatement provides:

> (1) Damages for harm are to be apportioned among two or more causes where
>
> (a) there are distinct harms, or
>
> (b) there is a reasonable basis for determining the contribution of each cause to a single harm.
>
> (2) Damages for any other harm cannot be apportioned among two or more causes.

Restatement (Second) of Torts § 433A. While the concept of "divisible" harm is difficult to establish, the Restatement notes that such harm "is still capable of division upon a reasonable and rational basis * * * where * * * apportionment can be made without injustice to any of the parties." *Id.* (comment d on subsection (1)).

is substantial. *See In re William H. Oliver*, CERCLA §106(b) Petition No. 94-8, slip op. at 22 (EAB, July 5, 1995) (stating that the burden of establishing divisibility or a reasonable basis for apportionment is "stringent" and "substantial") (citing *United States v. Picillo*, 883 F.2d 176, 183 (1st Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990) and *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3rd Cir. 1992)). Here, for the following reasons, the Board finds that CNSI has not met its burden of proving that the environmental harm at the Basket Creek site is capable of apportionment.

As its sole basis for apportionment, CNSI points to the number of drums attributable to it (80) compared to the total number of drums excavated from the site (4,546). It argues that its drums "could not possibly have contributed more than background contamination at that site, to which at least 4500 drums of hazardous substances from numerous other sources were sent, and did not cause the contamination that ultimately required the remediation." CNSI Supplement at 11. We reject this characterization of CNSI's contribution to the contamination at Basket Creek as being without factual foundation in the record. There is no evidence to suggest that the potential harm caused by 80 drums of hazardous waste would only cause "background" levels of contamination to the Basket Creek environment, *i.e.*, levels of contamination that might be found naturally in the environment if no dumping had taken place. For example, there is no evidence to suggest that even CNSI's lowest barrel estimate (4-5 barrels) would not pose a danger to sources of drinking water sources in the surrounding area, thereby obviating the need to protect those sources by performing a response action substantially similar to that which EPA ordered. In any case, in order to prove that environmental harm is divisible and reasonably capable of apportionment a party may not rely solely on the amount of hazardous substances it contributed to a site. As the court stated in *Chem-Dyne*, "the volume of waste of a particular generator is not an accurate predictor of the risk associated with the waste * * *." 572 F. Supp. at 811. Where, as here, wastes of varying (or unknown) toxicity and migratory potential commingle, courts often find it impossible or impractical to determine the amount of environmental harm cause by each party. *See Picillo*, *supra*, 883 F.2d at 178-79. Even in *Alcan I*, on which CNSI relies in support of

its argument in favor of divisibility, [24] the Third Circuit stated that although apportionment is possible where there are multiple responsible parties and commingling of wastes has occurred, "the analysis * * * will require an assessment of the relative toxicity, migratory potential and synergistic capacity of the hazardous waste at issue." *Alcan I*, *supra*, 964 F.2d at 269 (citing *Monsanto*, *supra*, 858 F.2d at 172 n.26); *see also*, *Alcan II*, *supra*, 990 F.2d at 722. In other words, in order to justify apportionment on the basis of the volume of the hazardous substances deposited at a site, a party must present some evidence disclosing the individual and interactive qualities of the substances. *Monsanto*, *supra*, 858 F.2d at 172. As the Second Circuit stated in *Monsanto*:

> Common sense counsels that a million gallons of certain substances could be mixed together without significant consequences, whereas a few pints of others improperly mixed could result in disastrous consequences.

Id. Thus, simply proving the number of drums contributed to a site is insufficient to justify apportionment. Accordingly, the Board finds that CNSI is jointly and severally liable for the entire harm caused at the Basket Creek site. [25]

Petition at 24.

In its supplement, CNSI cites to additional cases which, according to CNSI, support the argument that it should only be liable for a de minimis portion of the cleanup costs at the site. *See* CNSI Supplement at 9-16 (citing *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992); *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F. 2d 962 (1st Cir. 1993); *Garelick v. Sullivan*, 987 F.2d 913 (2d Cir, 1993); *United States v. Alcan Aluminium Corp.*, 990 F.2d 711, 722 (2d Cir. 1993); *In re Bell Petroleum Services*, 3 F.3d 889 (3d Cir. 1993); *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992); *Hoffman Homes, Inc v. EPA*, 961 F.2d 1310 (7th Cir. 1992); *Chesapeake and Potomac Telephone Co v. Peck Iron & Metal Co.*, 814 F. Supp. 1269, 1279 (E.D. Va. 1992); *Hatco Corp. v. W.R. Grace & Co.*, 801 F. Supp. 1309, 1329-30 (D. N.J. 1992); and *United states v. Gurley Refining Co.*, 788 F. Supp. 1473, 1484 (E.D. Ark. 1992)). Although some of these cases support the general proposition that, in certain circumstances, a party should not be held jointly and severally liable for remediation or response costs, none of them supports CNSI's assertion that such circumstances are

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C. *Arbitrary and Capricious or Otherwise Not in Accordance With the Law*

CNSI argues that the April 11, 1991 Order was arbitrary and capricious because: 1) CNSI was only responsible for a de minimis portion of the contamination, and 2) the Region has failed to establish CNSI's liability under CERCLA. Petition at 25. For the reasons stated above, the Board rejects both of CNSI's assertions in this regard.

CNSI further asserts that the order was "otherwise not in accordance with the law" for several reasons, none of which convinces us that CNSI is entitled to reimbursement of all or part of its clean-up costs. First, CNSI argues that "EPA's failure to include as respondents all known responsible parties and to compel other named Respondents to share in the costs of the cleanup was not in accordance" with § 300.415(a)(2) of the National Contingency Plan, 40 C.F.R. Part 300. [26] Petition at 26. As the Region points out, however, 40 C.F.R. § 300.415(a)(2) does not apply to removal actions under CERCLA § 106. *See* 40 C.F.R. § 300.415(k)(1) (removal actions pursuant to CERCLA § 106 are not subject to the requirements of § 300.415(a)(2)). CNSI's arguments in this regard are therefore rejected. Moreover, as stated above, the Board will not review the Region's determination not to name certain parties as respondents in an administrative order. [27]

(...continued)
present in this case.

Section 300.415, dealing with procedures for investigating and conducting removal actions, states, in pertinent part:

> (a)(2) Where the responsible parties are known, an effort initially shall be made, to the extent practicable, to determine whether they can and will perform the necessary removal action promptly and properly.

40 C.F.R. § 300.415(a)(2).

As stated above, CNSI is free to seek contribution from the other named parties in the order or any other liable party. CERCLA § 113(f), 42 U.S.C. § 9613(f).

Second, CNSI argues that the Region failed to show that an "imminent and substantial endangerment" existed at the Basket Creek site. In support of this claim, CNSI states only that "the existence of such hazardous substances at the site were known by Georgia EPD at least since March 1976 and by EPA Region IV at least since 1985." Petition at 26. The term "imminent and substantial endangerment" is not specifically defined in CERCLA. As the Board has previously stated, however:

> [T]he phrase has been scrutinized by the courts. "Endangerment means a threatened or potential harm and does not require proof of actual harm." *United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1394 (D.N.H. 1985). The "endangerment" need not be an emergency, nor does it have to be immediate to be "imminent." *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 193 (D.C. Mo. 1985). Given the importance of any threat to public health and the reality that implementing a corrective plan might take years, "imminence" must be considered in light of the time that might be needed to sufficiently protect the public health. *See B.F. Goodrich Co. v. Murtha*, 697 F. Supp. 89, 96 (D.Conn. 1988). Thus, an "endangerment" is "imminent" "if factors giving rise to it are present even though the harm might not be realized for years." *Conservation Chemical Co.*, 619 F. Supp. at 194.
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> Furthermore, the word "substantial" does not require quantification of the endangerment; "an endangerment is 'substantial' if there is reasonable cause for concern that someone or something may be exposed to a risk of harm by a release or a threatened release of a hazardous substance if remedial action is not taken." *Id*.

Sherwin-Williams, *supra*, at 14-15 (footnote omitted).

When the site was referred to EPA in 1989, the drums had already been at the site for approximately 13 years and were subject to deterioration from natural weather conditions and to potential discharge into the surrounding soil and groundwater. Indeed, as stated above, samples from a nearby drinking water wells revealed the presence of toxic substances such as mercury and trichloroethene. *See* Final Technical Assistance Team Report at 5 (May 2, 1990) (Exh. 18 to Region's Response). Further, as stated in the order:

> Liquid waste released from buried drums may migrate downward through the soil and impact the groundwater. In the area of the Site, groundwater is the sole source of drinking water for residents. Ten drinking water wells are located within a one-half mile radius of the Site. Additionally, groundwater discharges to surface water are common in this area. Contaminants migrating from the drum disposal area may impact a small unnamed stream adjacent to the Site. This stream flows into the Chattahoochee River less than a mile downstream of the Site.

Order at 4. Given the presence of a substantial amount of aging drums containing a variety of highly toxic substances, evidence of leakage of these substances, and the proximity of nearby drinking water wells, the Region had sufficient evidence to support a finding of "imminent and substantial endangerment." Thus, based on the record before us, we conclude that CNSI has not met its burden of demonstrating that the Region's determination in this regard was "arbitrary and capricious or otherwise not in accordance with law."

CNSI makes two additional arguments. First, CNSI argues that the Region failed to conduct an engineering evaluation/cost analysis ("EE/CA") as required by 40 C.F.R. § 300.415(b)(4) of the National Contingency Plan. Under this provision, EPA is required to conduct an EE/CA where "a planning period of at least six months exists before on-site activities must begin." 40 C.F.R. § 300.415(b)(4). Second, CNSI argues that the Region failed to comply with 40 C.F.R. § 300.820.

Petition at 26-27. Specifically, CNSI states that, pursuant to this section, "EPA is required to provide notice and a public comment period where EPA has determined that a removal action is appropriate and at least a six-month planning period exists before on-site removal activities must be initiated." *Id*. at 27. However, because both of these arguments assume the existence of a six-month planning period, and because no such period existed in the present case, [28] CNSI's arguments in this regard are rejected. [29]

D. *Constitutional Issues*

CNSI argues that the Region's CERCLA § 106(b) order was unconstitutional for a variety of reasons. Specifically, CNSI asserts that: (1) "[i]n imposing joint and several liability on CNSI and compelling CNSI to clean up the Basket Creek Site, EPA denied CNSI the equal protection and due process of law * * *;" (2) forcing CNSI alone to finance the cleanup constitutes a taking without compensation in violation of the Fifth Amendment; (3) "the provisions of CERCLA which permit EPA to compel an innocent party or a de minimis contributor to finance the cleanup of a site contaminated by the wastes of numerous parties, constitute an ex post facto and/or penal law, which violates Article I, Section 9 of the constitution * * *;" (4) EPA's actions imposed an impermissible fine on CNSI in violation of the Eighth Amendment; (5) the Region's actions violate the constitutional provision against bills of

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The Region determined that given the conditions at the site, the required removal action was "time-critical" and that removal actions would therefore be required within six months of the determination that a removal action was warranted. *See* Affidavit of Don Rigger, On-Scene Coordinator, U.S. EPA Region IV (Dec. 5, 1995) (Exh. 20 to Region's Response). Nothing in the record before the Board convinces us that the Region's determination in this regard was erroneous.

We note that 40 C.F.R. § 300.415(n)(2)(ii) contains a provision for public comment even where less than six months exists before on-site removal activity must begin. This provision is qualified, however, in that it states that a public comment period need only be provided "as appropriate." We interpret this language as providing the Region with discretion in determining whether or not to provide a public comment period. In the present case, CNSI has not come forward with evidence to show that such a comment period was "appropriate."

attainder; (6) CERCLA liability provisions as applied in this case constitute an impermissible tax on CNSI; (7) the imposition of CERCLA liability violated constitutional prohibitions of retroactive statutory application; and (8) the order violated CNSI's right to due process because CNSI was not given a meaningful opportunity to contest the order. Petition at 27-29.

For the most part, CNSI's constitutional objections arising out of EPA's application of CERCLA are premised on the assertion that CNSI is not a liable party under CERCLA, or, at most, is liable for only a de minimis portion of the costs incurred in complying with the Region's order. For the reasons stated above, however, the Board has rejected these arguments and concluded that CNSI is jointly and severally liable under CERCLA for all costs incurred in cleaning up the Basket Creek site. The reasons given by the Board are based on well established legal doctrines of CERCLA liability. The Board is unaware of any court authorities that have raised any serious constitutional issues concerning the application of these doctrines of liability. For that reason, the Board declines to address CNSI's arguments, except to reject them for the reasons stated herein. Further, to the extent that CNSI is challenging the constitutionality of CERCLA itself, we decline to address these challenges because the EAB has no authority to rule on the constitutionality of a statute enacted by Congress. *See In re Collier Carbon and Chemical Corp.*, 1 E.A.D. 267, 268-69 (Adm'r, Aug. 10, 1976) (stating that the Administrator is powerless to declare an act of Congress unconstitutional). [30]

Moreover, even if we were to address these issues, CNSI's arguments strike us as baseless and unsupported. *See Monsanto*, *supra*, 858 F.2d at 173 (rejecting due process objection to liability as well as bill of attainder, ex post facto, and retroactive liability arguments); *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726, 734 (8th Cir. 1986) (rejecting due process and takings clause defenses) *cert. denied*, 484 U.S. 848 (1987); *United States v. Kramer*, 757 F. Supp. 397, 428-32, 436 (D. N.J. 1991) (CERCLA procedural scheme is not unconstitutional; CERCLA satisfies both procedural and
substantive due process; imposing joint and several liability does not violate equal protection clause); *Kelly v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1444-45 (W.D. Mich.

(continued...)

III. *CONCLUSION*

In view of the foregoing, the Board concludes that CNSI has not proven by a preponderance of the evidence that it is not liable for response costs under CERCLA § 107(a), or that the Agency's August 11, 1991 Unilateral Administrative Order was "arbitrary and capricious or otherwise not in accordance with the law." Accordingly, CNSI's petition for reimbursement is denied. [31]

So ordered.

(...continued)
1989) (rejecting defense based on alleged unconstitutional retroactive application of CERCLA); *United States v. Hardage*, 1989 U.S. Dist. LEXIS 17,878 (W.D. Okla. 1989) (rejecting assertion that imposition of CERCLA liability amounted to the assessment of an impermissible tax); *United States v. Hooker Chemicals & Plastics Corp.*, 680 F. Supp. 546, 556 (W.D. N.Y. 1988) (rejecting defenses based on due process or takings clause of the Fifth Amendment); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 176, 214-15 (D. Mo. 1985) (provisions of CERCLA are not facially unconstitutional; where there are opportunities for contribution as well as for joinder or impleader of responsible parties, imposition of joint and several liability is not unconstitutional).

In its original petition, dated September 14, 1992, CNSI stated that because of a pending civil suit in the Superior Court of Fulton County, Georgia, certain evidence "is not available in its final form." Petition at 5-6. CNSI therefore requested that it be given an additional 120 days or until the close of the discovery period in the civil litigation, whichever is later, to supplement its petition. However, because CNSI has already submitted a supplement to its petition, dated October 22, 1993, and because the above-referenced civil litigation has now been dismissed, CNSI Supplement at 18, CNSI's request is now moot.